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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. ~~849~~.72

DAVID WALTON CRAMP, JR.,
Appellant,

VS.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

MOTION TO DISMISS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 849.

DAVID WALTON CRAMP, JR.,
Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

MOTION OF APPELLEE TO DISMISS APPEAL.

Appellee Board of Public Instruction of Orange County, Florida, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds (a) that the appeal does not present a substantial federal question and (b) that in part the

federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

There is attached hereto as an appendix, cited herein as "Appellee's App. ...," a copy of the complaint filed by Appellant, so that this Court may readily determine whether Appellant was entitled to have determined by the Florida Supreme Court certain particular contentions then or now argued by Appellant but not passed on by that Court.

QUESTIONS PRESENTED BY APPELLANT.

Appellant asserts the unconstitutionality of Sections 876.05 and 876.06, Florida Statutes, which require public employees to execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

Both in the Notice of Appeal and in the Jurisdictional Statement counsel for Appellant attacks the prescribed oath as a whole without always clearly pointing out the specific portion of the oath to which a particular attack

is directed. We believe that it will be difficult to determine the substantiality of particular attacks, or the sufficiency of the raising of the particular questions, without breaking the oath down into its various parts and keeping in mind the specific language that is the subject of the particular attack that is made. We accordingly rephrase what we understand to be the contentions that are here made by Appellant so as to direct the particular contentions to the specific portions of the prescribed oath to which the contentions appear to apply. Appellant's contentions, as we understand them, are as follows:

(a) That requiring a school teacher as a condition to public employment to execute an oath that "I am not a member of the Communist Party and I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence" is a violation of due process of law;

(b) That requiring a public school teacher (who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath and is an unconstitutional *ex post facto* law and an unconstitutional bill of attainder; and

(c) That requiring a public school teacher as a condition to public employment to disavow belief in the overthrow of the Government of the United States or of the State of Florida by force or violence violates the First Amendment guarantees of freedom of speech, thought and association.

We will discuss in the order stated the substantiality of these questions attempted to be presented by Appel-

lant and in connection with questions (b) and (c) will also discuss whether such questions are in fact appropriately presented to this Court as questions which ought to be considered and decided by this Court.

1. The Contention That Requiring a School Teacher As a Condition to Public Employment to Execute an Oath That "I Am Not a Member of the Communist Party and I Am Not a Member of Any Organization or Party Which Believes in or Teaches, Directly or Indirectly, the Overthrow of the Government of the United States or of Florida by Force or Violence" Is a Violation of Due Process of Law Does Not Present a Substantial Federal Question.

If scienter were not implicit in the prescribed oath, we would, of course, have substantially the situation of *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216, but prior to the time here relevant the Supreme Court of Florida in *State* v. *Diez*, 97 So.2d 105, had held that the element of scienter was implicit in each of the requirements of our statute and in the present case the Supreme Court of Florida reaffirmed the holding of the Diez case in this regard (Appellant's App. 9). This was, of course, in accord with *Garner* v. *Board of Public Works*, 341 U.S. 716, text 724, 71 S. Ct. 909, 95 L. Ed. 1317, text 1324, and other decisions of this Court cited by the Supreme Court of Florida in its opinion.

With the question of scienter out of the way, there is no substantial Federal question left open by the decisions of this Court so far as a requirement that a teacher swear that he is not a member of the Communist party or a member of an organization or party which believes in, or teaches, the overthrow of the Government by force or violence, is concerned. A part of the oath sustained in *American Communications Asso.* v. *Douds*, 339 U.S. 382, 70 S. Ct. 674,

94 L. Ed. 925, was a provision that the affiant "is not a member of the Communist Party" (See p. 386 of 339 U.S., p. 936 of 94 L. Ed.) and a part of the oath sustained in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, was a provision that affiant is not "now" a member of or affiliated with "any group society, association, organization or party which advises, advocates or teaches * * * the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California".

In *Pockman* v. *Leonard*, 345 U.S. 962, 73 S. Ct. 951, 97 L. Ed. 1381, this Court dismissed for the want of a substantial federal question an appeal seeking to review a decision of the Supreme Court of California in *Pockman* v. *Leonard*, 39 Cal. 2d 676, 249 P.2d 267, which sustained an oath prescribed by a statute that required each civil defense worker to swear that he did not belong to any organization that advocated overthrow of government by force or violence or other unlawful means.

In *Barenblatt* v. *United States*, 360 U.S. 109, text 128, 79 S. Ct. 1081, 3 L. Ed. 2d 1115, text 1130, this Court stated:

> "This Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 95 L. Ed. 745, 71 S. Ct. 565; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 95 L. Ed. 1317, 71 S. Ct. 909. See also Beilan v. Board of Public Education, 357 U.S. 399, 2 L. Ed. 2d 1414, 78 S. Ct. 1317, 1324; Lerner v. Casey, 357 U.S. 468, 2 L. Ed. 2d 1423, 78 S. Ct. 1311; Adler v. Board of Education, 342 U.S. 485, 96 L. Ed. 517, 72 S. Ct. 380, 27 A.L.R. 2d 472."

(The cases cited above in the Barenblatt case, of course, dealt not only with "those occupying or seeking public office" but with public employees as well.)

See also: *Pickus* v. *Board of Education*, 9 Ill. 2d 599, 138 N.E.2d 532; *Thorp* v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. Ed. 608); *Laba* v. *Newark Board of Education*, 23 N.J. 364, 129 A.2d 273; *Fitzgerald* v. *City of Philadelphia*, 376 Pa. 379, 102 A.2d 887.

2. The Contention That Requiring a Public School Teacher (Who Swears in This Case That He Has Never Lent His Aid, Support, Advice, Counsel or Influence to the Communist Party) to File an Oath to That Effect with Public School Authorities Is to Require an Unconstitutional "Expurgatory" Oath and Is an Unconstitutional Ex Post Facto Law and an Unconstitutional Bill of Attainder Does Not Raise a Substantial Federal Question.

We do not question that if we had in this case the situation of a public school teacher who had lent aid, support, advice, counsel or influence to the Communist Party twenty or thirty years before the passage of the act here in question but who swears that he is not now a member of the Communist Party or any organization or party which believes in or teaches the overthrow of the Government of the United States or of Florida by force or violence and will not lend his aid, support, advice, counsel or influence to the Communist Party in the future, we would have a substantial federal question as to whether such a teacher could be denied public employment; but we have here no such situation.

The situation in our case was set out in the opinion of the Florida Supreme Court (Appellant's App. 16) as follows:

> "By the allegations of his complaint, the appellant under oath affirmatively denied any present or past associations which would preclude him from executing the subject oath. He stated in his complaint '* * * that he has not, does not, and will not lend (sic) aid, support or advice (sic) counsel or influence to the Communist Party; * * *.' Further, the appellant disavows any belief in the violent overthrow of either the State or Federal government. He denies membership in any organization which believes in or teaches such conduct. The complaint alleges that appellant 'is a loyal American' and he states that he does not decline to execute the required oath because of fear of penalties for the making of a false oath."

Appellant's complaint was sworn to by him (see page 5 of Appellee's Appendix). The detailed allegations of paragraph 6 of the complaint which are summarized in the above excerpt from the Florida Supreme Court's opinion will be found at page 2 of Appellee's Appendix.

The Florida Supreme Court disposed of Appellant's bill of attainder and *ex post facto* contentions (Appellant's App. 17) as follows:

> "* * * there could not possibly be a legislative adjudication of guilt for the simple reason that the complaint on which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore, as to this appellant the statute could not constitute an ex post facto law for the obvious reason that appellant asserts that he has never in the past been connected with any association which could lead to current punishment. In short, because of the allegations of his own complaint the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statute on the grounds that it is a bill of attainder, or an ex post facto law."

Right on the face of things, we submit, there can be no question that the Florida Supreme Court was correct in its holding that the subject statute is not a bill of attainder or an *ex post facto law as to Appellant*; and in view of the well-established rule that one may not claim standing in this Court to vindicate the constitutional rights of some third party (*Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252; *Liberty Warehouse Company* v. *Burley Tobacco Growers' Cooperative Marketing Association*, 276 U.S. 71, 48 S. Ct. 291, 72 L. Ed. 473), there would, of course, be here no occasion for this Court to determine whether under circumstances not before the Court the subject statute might conceivably be a bill of attainder or an *ex post facto* law as to some third party. The policy of "strict necessity" in disposing of constitutional issues has been many times announced by this Court. See: *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666.

A determination that the statute prescribing the clause of the oath we are now discussing could not be a bill of attainder or an *ex post facto* law as to Appellant would then leave the following as the only question still remaining with regard to such clause:

Where a public school teacher before he is discharged brings a suit for a declaratory decree asserting in his sworn complaint that he has never lent his aid, support, advice, counsel or influence to the Communist party, is he entitled to a declaratory decree adjudging to be unconstitutional as to him a statute requiring him as a condition to continued employment to file with the public school authorities an oath swearing to the same things that he has sworn to in such complaint?

We submit that such contention can scarcely rise to the level of a constitutional controversy. This Court has held that only those who are adversely affected by a statute can draw in question its constitutional validity in a declaratory judgment proceeding as in any other: *Alabama State Federal of Labor* v. *McAdory*, 325 U.S. 450, text 463, 65 S. Ct. 1384, 89 L. Ed. 1725, text 1736. This Court has said time and time again that a party insisting upon the invalidity of a statute, as violating any constitutional provision, must show some injury to him before the courts will listen to his complaints: *Coffman* v. *Breeze Corporation*, 323 U.S. 316, text 325, 65 S. Ct. 398, 89 L. Ed. 264, text 271; *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 323; *Peoples Banking Co.* v. *Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L. Ed. 586; *Premier Pabst Co.* v. *Grosscup*, 298 U.S. 226, 56 S. Ct. 754, 80 L. Ed. 1155.

Not only has Appellant failed to show any injury to him by being required to file with the school authorities an oath swearing to the things that he swears to in the case itself but, if he is actually innocent of having lent aid, support, advice, counsel or influence to the Communist Party in the past, it is difficult to see how requiring him to file an oath to that effect could possibly violate his constitutional rights anyway. Such an "expurgatory" oath was sustained in *Garner* v. *Board of Public Works*, 341 U.S. 716, text 720-721, 71 S. Ct. 909, 95 L. Ed. 1317, text 1323. The discussion of the Garner and other cases in *Speiser* v. *Randall*, 357 U.S. 513, text 527-529, 78 S. Ct. 1332, 2 L. Ed. 2d 1460, text 1473-1475, serves to emphasize that there could be no possible constitutional objection to requiring Appellant here to reiterate before the public school officials what he had already sworn to in his complaint. As the Florida Supreme Court said (Appellant's App. 17):

> "It being clear from the allegations of his own complaint that he has never been affiliated with any proscribed association, we are not persuaded that the requirement that he so state under oath could adversely affect him."

We submit that Appellant clearly does not present as to this particular clause of the oath any substantial federal question that he is entitled to raise.

3. The Contention That the Florida Statute in Question Violates the First Amendment Guarantees of Freedom of Speech, Thought and Association in the Provision of Said Statute Requiring, As a Condition to Employment as a Public School Teacher, Disavowal of Belief in the Overthrow of the Government of the United States or of the State by Force or Violence, Not only Was Not Sufficiently Raised or Passed on by the State Court As to Require Decision but Would Not Raise a Substantial Federal Question If It Had Been Raised Before or Passed on by the State Court.

While counsel for Appellant in his Jurisdictional Statement (p. 15) refers to the Florida Statutes requiring the non-existence "of certain beliefs as a condition precedent to continuing employment as a public school teacher," he fails to call attention to just how limited the disavowal of beliefs that is required actually is. As a matter of fact the only disavowal of belief that the statute requires in the prescribed affidavit is that the person making the affidavit "does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" (p. 4 of Jurisdictional Statement).

While counsel for Appellant in stating his third point in his Jurisdictional Statement (p. 15 of the Jurisdictional

Statement) contends that requiring a disavowal of belief violates the First Amendment guarantees not only of freedom of thought but of freedom of association and of freedom of speech as well, it is obvious on the face of things that freedom of association has no relevancy at all in determining the constitutionality of a required disavowal of a specified belief and freedom of speech has only an indirect relevance, if any at all.

We will refer later to the fact that the contention now made by Appellant that the required disavowal of belief violates constitutional guarantees of freedom of thought and of speech was nowhere made in Appellant's complaint nor was such point specifically passed on by either the trial court or the Supreme Court of Florida. If the contention had been specifically made in the courts below by Appellant and passed on by such courts that the required negation of belief violated the First Amendment guarantees of freedom of thought and of speech, such contention would not have presented a substantial federal question. Such a contention is no longer fairly open in view of *American Communications Asso.* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925, considered with *Adler* v. *Board of Education,* 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517, and *Speiser* v. *Randall,* 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. Counsel for Appellant says (p. 16) that the "belief" provision in Section 9 (h) of the Labor Management Relations Act was sustained "by an equally divided court" in *American Communications Asso.* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925. That is true so far as the total provision is concerned but Mr. Justice Frankfurter by restricting his dissent to Part VII of the Court's opinion and his comments elsewhere in his dissenting opinion made it clear that he would have sustained an affidavit requirement that the person executing

the affidavit did not believe in the overthrow of the United States Government by force. Compare:

> "Justice Frankfurter in a separate opinion, concurring in part, agreed that Congress could validly require disavowal of actual membership in the Communist party or of active belief in the overthrow of the government by force, but felt that to the extent that the Section went beyond that it was invalid."
>
> Note, 11 Maryland Law Review, p. 343.

Counsel for Appellant says (pp. 16-17) that the Supreme Court of Florida did not construe the clause of the Florida statute in question (as to belief "in the overthrow of the Government of the United States or of Florida by force or violence") as meaning that the clause applied only to those who believed "in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy" and that the Florida Supreme Court "failed and refused" to define the terms used by the statute. The Florida Supreme Court did not "refuse"* to define the terms used by the statute. It failed to define precisely what was meant by "does not believe in the overthrow of the Government * * * by force or violence" because there was no particular occasion to define the terms but there is no reason at all to assume that the clause means anything other than what it would appear on its face to mean, viz., that the person executing the affi-

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*There is, of course, nothing in the record to show that counsel for Appellant "urged" the Supreme Court of Florida "to define the terms used by the statute" (so far as belief in the overthrow of the Government is concerned) and if counsel were permitted to go outside the record in that regard (which we do not understand to be the case) we would definitely take issue with the intimation by counsel for Appellant that he did "urge" on the Supreme Court of Florida such a definition of terms as is intimated in his Jurisdictional Statement.

davit is not a person who believes in the violent overthrow of the Government as it presently exists under the Constitution. Compare: *American Communications Asso.* v. *Douds*, 339 U.S. 382, text 407, 70 S. Ct. 674, 94 L. Ed. 925, text 948; *Mountain Timber Company* v. *State of Washington*, 243 U.S. 219, text 246, 37 S. Ct. 260, 61 L. Ed. 685, text 700; *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U.S. 740, text 746-747, 62 S. Ct. 820, 86 L. Ed. 1154, text 1163.

In the Court's opinion in *American Communications Asso.* v. *Douds*, 339 U.S. 382, text 408, 70 S. Ct. 674, 94 L. Ed. 925, text 949, the Court said that to attack the straw man of "thought control" is to ignore the fact that the sole effect of the statute upon one who believes in overthrow of the Government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader." This language with reference to a union leader may well be considered in connection with the language of the Court in *Adler* v. *Board of Education*, 342 U.S. 485, text 492-493, 72 S. Ct. 380, 96 L. Ed. 517, text 524, with regard to school teachers as follows:

> "It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgement of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> "It is clear that such persons have the r nder our law to assemble, speak, think and believ they will. American Communications Asso. C. I. O. v. Douds, 339 U.S. 382, 94 L. Ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose

to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because first, of their advocacy of the overthrow of the government by force or violence, or secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.

* * *

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

Compare:

"Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. * * * A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching. The teacher is not obliged to take

the oath; but if he refuses to do so he is not entitled to teach. * * *

"There is of necessity a close association between belief in force and teaching which is intimately related to fitness. One may not divorce one's beliefs from one's teachings."

Thorp v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462, text 470 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. Ed. 608).

The contention now made by Appellant that the requirement in the subject statute that Appellant negative his belief in the overthrow of the Government by force or violence violates the First Amendment guarantees of freedom of speech or of thought was not passed on by the Supreme Court of Florida (Appellant's App. 6-17) or specifically referred to in the Court's opinion. Reference to Appellant's complaint (Appellee's App. 1-5) will show that such contention was not specifically raised in the complaint nor was it mentioned as a specific contention in the Circuit Judge's opinion (Appellant's App. 1-3). (This particular clause of the prescribed oath was not referred to at all in the Circuit Judge's opinion nor was any reference at all made to "freedom of thought". The only reference to "freedom of speech" was made in such a way as not to indicate any connection between the reference and the particular clause of the oath we are now dealing with.)

It is the rule in Florida (*Henderson* v. *Antonacci*, 62 So.2d 5, text 8) as well as generally (16 C.J.S. 331-332) that courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings. It is also the rule in Florida (*Smith* v. *Ervin*, 64 So.2d 166, text 171) and generally (16 C.J.S. 335-336; *Corn* v. *Fort*, 170 Tenn. 337, 95 S.W.2d 620, text 628) that one who challenges the

constitutionality of an act of the Legislature must point out to the court exactly how and in what manner his constitutional rights will surely be, or have been invaded or infringed.

Paragraph 8 of the complaint (Appellee's App. 2-4) is the paragraph which sets out Appellant's attack on the subject statute. Outside of the general charge at the end of the paragraph (Appellee's App. 3-4) that the requirement of the oath in its entirety deprives plaintiff of due process of law, the only allegation in paragraph 8 that could conceivably have anything to do with a contention that requiring Appellant to negative the specified belief violates the guaranteed freedom of thought and of speech is the first sentence (Appellee's App. 2) in which Appellant asserts that the requirement that he execute the oath as a condition precedent to his continuing employment by the defendant "is a violation of his rights as a free, loyal American citizen as guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States". This allegation clearly is too general and vague to present the particular constitutional claim now made and lacks the requisite specificity: 16 C.J.S. 335-339; *State* v. *Flanigan*, 349 Mo. 54, 159 S.W.2d 598; *Jewel Tea Co.* v. *Rowe*, 414 Ill. 495, 111 N.E.2d 568; *Biggs* v. *Cummins*, 5 Ill. 2d 512, 126 N.E.2d 208, text 210; *Glover* v. *City of Rome*, 173 Ga. 239, 160 S.E. 249. See also: *Stembridge* v. *Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Thomas* v. *Iowa*, 209 U.S. 258, 28 S. Ct. 487, 52 L. Ed. 782.

The rule is, of course, well established in this Court that this Court will not on an appeal from a state court consider constitutional questions which have not been seasonably raised before or passed on by the state court: *Nelson* v. *County of Los Angeles*, 362 U.S. 1, text 9, 80 S. Ct. 527, 4 L. Ed. 2d 494, text 500; *Adler* v. *Board of Edu-*

cation, 342 U.S. 485, text 496, 72 S. Ct. 380, 96 L. Ed. 517, text 526; *Edelman* v. *California*, 344 U.S. 357, text 358, 73 S. Ct. 293, 97 L. Ed. 387, text 391; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. Ed. 506; *Harding* v. *Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 394.

It is respectfully submitted that the question of whether requiring Appellant to negative under oath his belief in the overthrow of the Government by force or violence was an unconstitutional violation of freedom of thought or freedom of speech guaranteed to him by the First Amendment (as incorporated into the Fourteenth Amendment) was not either raised in or passed on in the state courts and that, if such question had been suitably raised in or passed on in the state courts, it would not have presented a substantial federal question.

CONCLUSION.

In concluding, we submit the following:

1. The contention that requiring a school teacher as a condition to public employment to execute an oath that he is not a member of the Communist Party and is not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government by force or violence, is a violation of due process of law does not present a substantial federal question, where the element of scienter has been held by the state court to be implicit in the applicable statute.

2. The contention that requiring Appellant (a public school teacher who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is an unconstitutional *ex post facto* law

or an unconstitutional bill of attainder as to Appellant does not present a substantial federal question.

3. Appellant is not entitled to raise the question whether the applicable statute could be an unconstitutional *ex post facto* law or an unconstitutional bill of attainder as to persons and under circumstances not now before the Court.

4. The contention that requiring a public school teacher (who swears in his complaint in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath does not present a substantial federal question.

5. Appellant has not appropriately raised (nor did the state courts pass on) Appellant's contention that the Florida statute in question violates the First Amendment guarantees of freedom of speech and freedom of thought in the provision of such statute requiring, as a condition to employment as a public school teacher, disavowal of belief in the overthrow of the Government of the United States or of the State by force or violence.

6. If Appellant had appropriately raised, or if the state courts had passed on, the question of whether the Florida statute in question violates the First Amendment guarantees of freedom of speech, thought and association in the provision of such statute requiring, as a condition to employment as a public school teacher, disavowal of belief in the overthrow of the Government by force or violence, the contention here made by Appellant in that regard would not have presented a substantial federal question.

It is respectfully submitted that this appeal does not present in any particular a substantial federal question and, further, in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

Respectfully submitted,

J. R. WELLS,
135 Wall Street,
(P. O. Box 633),
Orlando, Florida,
Attorney for Appellee.

CERTIFICATE OF MAILING.

I, J. R. WELLS, Attorney for Appellee and a member of the Bar of the Supreme Court of the United States, hereby certify that on April ....., 1961, I served a copy of the foregoing Motion to Dismiss on the Appellant, DAVID WALTON CRAMP, JR., by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of TOBIAS SIMON, 706 Ainsley Building, Miami 32, Florida, and I further served a copy on the Attorney General of the State of Florida by mailing a copy thereof in a duly addressed envelope with postage prepaid to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

J. R. WELLS,
135 Wall Street,
(P. O. Box 633),
Orlando, Florida,
Attorney for Appellee.

COMPLAINT.

(Formal parts omitted)

* * * * *

The plaintiff, by his undersigned attorneys, states:

1. The plaintiff is a resident of Orange County, Florida, and is over the age of twenty-one years.

2. The defendant is a body corporate created by the Legislature of the State of Florida, and is charged with the administration of the public schools located in Orange County, Florida.

3. The plaintiff has been employed by the defendant for nine years last past in the capacity as teacher, and is now employed in that capacity at William R. Boone High School, located in the City of Orlando, County of Orange and State of Florida.

4. The plaintiff has been requested by the principal of the said high school (one of the instructional personnel employed by the defendant) to subscribe to the following oath prescribed by F.S. §876.05 as follows:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of

the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

5. Plaintiff has been advised that the execution of said oath is a statutory prerequisite to his continued employment by the defendant, and that upon his failure to subscribe to said oath, he can be immediately discharged and his name can be removed from the payroll of the defendant.

6. The plaintiff avers that he has, does and will support the Constitution of the United States and of the State of Florida; he is not a member of the Communist Party; that he has not, does not and will not lend, aid, support, advice, counsel or influence to the Communist party; he does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; he is not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence.

7. The plaintiff is a loyal American and does not decline to execute or subscribe to the aforesaid oath for fear of the penalties provided by law for a false oath.

8. The plaintiff avers, however, that the requirement of the statutes of Florida and of the defendant that he execute the said oath as a condition precedent to his continuing employment by the defendant is a violation of his rights as a free, loyal American citizen as guaranteed by the First and the Fourteenth Amendments to the Constitution of the United States and Sections 12, 13 and 15 of the Declaration of Rights and Article 16, Section 2 of

the Constitution of the State of Florida. The said oath, insofar as it requires plaintiff to swear or affirm that he has not lent aid, support, advice, counsel or influence to the Communist Party is an ex post facto law, illegally retroactive, and deprives him of liberty and property in violation of due process of law guaranteed by the Fourteenth Amendment of the United States Constitution; that the aforesaid oath, insofar as it requires plaintiff to swear or affirm that he has not and will not lend aid, support, advice, counsel or influence to the Communist Party without the qualification that he has not *knowingly* and will not *knowingly* lend aid, support, advice, counsel or influence to the Communist Party, is arbitrary and capricious and deprives plaintiff of due process of law guaranteed by the Fourteenth Amendment; that the aforesaid oath, insofar as it requires plaintiff to swear or affirm that he is not a member of any organization or party which believes in or teaches, directly or indirectly, overthrow of the Government of the United States or of the State of Florida by force or violence without the qualification that he is not a member of any organization or party which to his knowledge so believes or teaches, is arbitrary and capricious and deprives plaintiff of due process of law guaranteed by the Fourteenth Amendment; that the aforesaid oath, insofar as it seeks to deprive plaintiff of his employment for failure to swear or affirm that he is not a member of the Communist Party and has not lent his aid, support, advice, counsel or influence to the Communist Party and is not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence, is a bill of attainder and unconstitutional under Art. I, §9 of the United States Constitution; and that the requirement of

the oath in its entirety deprives plaintiff of freedom of association and due process of law guaranteed by the First and Fourteenth Amendments of the United States Constitution.

9. For the reasons above set forth, the plaintiff declines to execute or subscribe to the oath as set forth in F.S. 876.05.

10. The plaintiff fears that the defendant will discharge or attempt to discharge him from its employ as a consequence of his declining to execute or subscribe to the said oath.

11. The action of the defendant in discharging or attempting to discharge the plaintiff from its employ would constitute irreparable damage, harm and injury to the plaintiff in that he would be unable to work as a teacher, the work for which he has been trained and in which he has specialized for approximately ten years last past.

12. The plaintiff is in doubt as to his rights and obligations with regard to the defendant as the same are affected by a statute whose validity and constitutionality is questioned by the plaintiff, and the plaintiff desires a declaration of his rights and status thereunder.

WHEREFORE and by reason of the foregoing, the plaintiff prays that this Honorable Court take jurisdiction of the within cause and determine the validity of F.S. 876.05 et seq., insofar as the same is applicable to the plaintiff, if at all, and to construe the plaintiff's rights and obligations thereunder as an employee of the defendant, and pending such determination to temporarily enjoin the defendant from discharging or attempting to discharge the plaintiff from its employ, and upon a final determination of the rights, obligations and status of the

plaintiff under the provisions of F.S. 876.05 et seq. to permanently enjoin the defendant from requiring that the plaintiff execute the oath required by F.S. 876.05 and to permanently enjoin the defendant from discharging the plaintiff for his failure to execute the said oath.

TOBIAS SIMON AND HOWARD W. DIXON
Attorneys for Plaintiff
706 Ainsley Building
Miami, Florida
By: /s/ TOBIAS SIMON

STATE OF FLORIDA)
) SS.
COUNTY OF ORANGE)

BEFORE ME, the undersigned authority, duly authorized to take oaths and acknowledgments, personally appeared DAVID WALTON CRAMP, JR., who being by me first duly sworn, deposed and said that he has read all of the allegations of the foregoing Complaint for Declaratory Relief and states that the same are true and complete.

/s/ DAVID WALTON CRAMP, JR.
DAVID WALTON CRAMP, JR.

SWORN TO AND SUBSCRIBED before me this 7th day of January, 1960.

/s/ Doris E. Page
Notary Public, State of Florida at Large

My Commission Expires: Dec 8, 1960

(Notary Seal)